

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v. P. v. Watson CA3

THOMAS BURTON WATSON,

Defendant and Appellant.

C046776

(Super. Ct. No.
89F898)

After a jury found that defendant Thomas Burton Watson was a sexually violent predator (SVP), he was committed to the custody of the Department of Mental Health for two years pursuant to the Sexual Violent Predators Act¹ (SVPA).

Defendant's sole contention on appeal is that the trial court erred in permitting the People to use his 1966 conviction from his plea of no contest as a basis for explaining defendant's score on the STATIC-99 used to predict his future dangerousness. Finding no error, we shall affirm the judgment.

¹ Welfare and Institutions Code section 6600 et seq.

FACTS

A

The Prosecution

In October 1988, defendant pled guilty in Siskiyou County to eight crimes involving lewd and lascivious or sexual acts involving five different boys. A year later, he pled guilty in Shasta County to three similar offenses. He received a 24-year prison sentence for these offenses.

Defendant met his victims through his wife who was a school teacher. She had put a note on the classroom board asking for help cleaning their house. Some children responded, and through these children, defendant met other boys whom he recruited to help him on out-of-town business trips. During these overnight trips, defendant offered the boys alcohol and "Spanish flies," to increase their sexual arousal. Defendant showed them movies of homosexual acts and encouraged them to make their own movies. Defendant performed sexual acts on the boys including masturbation, oral copulation, and sodomy.

Drs. Dawn Starr and Kathleen Longwell, psychologists who were experts in performing SVPA evaluations, interviewed defendant and reviewed his "rap sheet," and probation and medical reports.

Both diagnosed defendant as a pedophile. The Diagnostic Statistical Manual of Mental Diseases describes a pedophile as having, for a period of at least six months, sexually deviant fantasies, urges, or behavior toward prepubescent children that causes him major impairment in life's functioning.

Dr. Starr's opinion was that defendant's pedophilia caused him to suffer volitional impairment because he repeatedly engaged in sexual misconduct knowing he could be caught for his behavior and he shifted blame to his victims.

Both Drs. Starr and Longwell were of the opinion that defendant was likely to commit future criminal acts of sexually violent predatory behavior without appropriate treatment, based on his records, statements, and actuarial instruments, such as the STATIC-99.

The STATIC-99 is an actuarial screening tool that uses 10 items to predict recidivism. Dr. Starr arrived at a score of four for defendant, which placed him in the medium-high range of risk. He received one point because all his victims were unrelated to him, another point because all his victims were male, and another two points because of an incident in 1966 that resulted in three charges against him and a no contest plea.²

Dr. Starr explained that the STATIC-99 underestimates the likelihood of recidivism because it does not measure undetected offenses. According to Dr. Starr, defendant had other factors that increased his risk of recidivism that were not accounted for in his STATIC-99 score, such as the fact his parents were

² In interviews with Drs. Starr and Longwell, defendant described the 1966 incident. When defendant was in his early 20's, a young boy came to his house all the time, pestering him. Defendant thought the boy needed a father figure. He had sexual contact with the boy on one occasion but felt it was wrong. He got in trouble for having sex with a minor and sought counseling on his own for approximately one year.

divorced, he committed sexually deviant acts with at least eight boys while married, he had a higher sex drive than average, and tended to blame his victims.

Dr. Longwell also arrived at a final score of four for defendant. While Dr. Longwell considered the STATIC-99 the best instrument available, it was imperfect and she did not want to make "such a serious decision" using only this screening tool. It was her opinion that defendant's history that included multiple victims and multiple sex acts with boys in groups suggested that he suffered from a much higher level of sexual deviancy as compared to the "typical sex offender." Other factors that increased his risk of recidivism were his lack of a father in his youth, his belief that the victims initiated the sexual contact, his lack of insight into his mental disorder and need for treatment, and his use of sex as a coping mechanism.

Psychologist Kent Caruso conducted a psychological examination of defendant in November 1988. At that time, he said defendant suffered from the now-defunct diagnosis of ego dystony, meaning that defendant may have been homosexual but had conflicts about "it" and could not deal with his feelings, urges, or impulses. Defendant's diagnosis now would be "pedophilia homosexually oriented."

Defendant was called as a witness for the People. He believes he does not have a mental disorder, that his sexual urges are fully within his control, and represses his sex drive because he is 62 years old. He explained that one of the boys

he was convicted of molesting "knew exactly what he was doing," and "was good at it [oral copulation]."

B

The Defense

Dr. Theodore Donaldson, a psychologist who has done 20 SVPA evaluations for the Department of Mental Health, interviewed defendant, reviewed crime reports, probation reports, and the evaluations by Drs. Starr, Longwell, and Caruso. It was his opinion that defendant did not meet the criteria for a diagnosed mental disorder. Defendant was a criminal child molester, not a pedophile. Assuming that defendant suffered from pedophilia, he had a 5 percent risk of reoffense. It was Dr. Donaldson's opinion that the STATIC-99 has some degree of accuracy but is not accurate enough "for the kinds of decisions people would like to make."

DISCUSSION

The Court Did Not Err In Allowing Evidence Of The 1966 Incident To Be Used In Defendant's Trial

Defendant argues that his 1966 conviction based on his no contest plea was improperly used against him for any purpose, including as an explanation for the expert witnesses' STATIC-99 scoring of defendant. We disagree.

Background

Prior to the start of trial, defendant moved to exclude any reference to his 1966 conviction based on his plea of no contest because former Penal Code section 1016 prohibited the use of the no contest plea and its factual basis as an admission against

him in a civil suit based upon or growing out of the act upon which the criminal prosecution was based. The court excluded evidence of defendant's 1966 no contest plea but permitted the People's expert witnesses to use the facts of the 1966 incident, as related to them by defendant, in forming their expert opinions.

Defense counsel later requested that the experts omit from defendant's score on the STATIC-99 the points they assigned to the 1966 offense. The court held an Evidence Code section 402 hearing to understand the scoring procedure.

Dr. Starr testified that the STATIC-99 is a research instrument that uses 10 factors to predict sexual reoffense. One of the 10 factors is the existence of charges or convictions prior to the predicate convictions. The examiner looks at the number of charges versus the number of convictions and selects the higher number. Defendant's 1966 incident resulted in three charges and only one conviction. The STATIC-99 assigns the conviction one point and the charges two points, so she selected the higher score of two for the 1966 incident.

The court ruled that because Dr. Starr relied only on the charges rather than the conviction from the no contest plea, she could testify about the STATIC-99 scoring procedure.

Analysis

At the time of defendant's 1966 plea, Penal Code section 1016, subdivision 3, provided that the effect of a nolo contendere plea "shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an

admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.” (Stats. 1963, ch. 2128, § 1, p. 4418, italics added.)

While an SVPA proceeding is a civil action (*Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 680), defendant’s plea was not used against him. Rather, the experts used the fact that defendant was *charged* with three offenses arising out the 1966 incident as part of defendant’s score in the STATIC-99. Contrary to defendant’s assertion, his score was not based on the conviction that arose from his no contest plea. Dr. Starr specified that she used the fact that defendant had three charges arising from the 1966 incident and not the one conviction because the charges produced two points on the STATIC-99 instead of one point that the conviction produced.

Moreover, the details regarding the 1966 incident that the experts related at trial came not from the plea, but rather, from current interviews with defendant. For this reason, we distinguish *Cartwright v. Board of Chiropractic Examiners* (1976) 16 Cal.3d 762, 764, 772, in which our Supreme Court held that a conviction based on a no contest plea could not be the basis for revoking a chiropractic license. The court observed that “when the conviction is based on a nolo contendere plea, its reliability as an indicator of actual guilt is substantially reduced” (*Id.* at p. 773.) Here, defendant himself admitted to the People’s experts the facts behind the 1966 offense. Therefore, the concerns about whether defendant actually committed the offense are not present in this case.

In sum, because defendant's no contest plea was not used against him as an admission in this SVPA proceeding, the court did not err.

DISPOSITION

The judgment (order committing defendant to the Department of Mental Health as an SVP) is affirmed.

ROBIE, J.

We concur:

RAYE, Acting P.J.

CANTIL-SAKAUYE, J.